No. 15389

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR L. DE CASAUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Introductory Note.

The Reporter's Transcript was not all prepared at one time, a portion of it having been made up during the trial. Thus, the Transcript is not consecutively numbered, nor is the Transcript for a single day necessarily all in a single volume. To avoid confusion both the date and the page are cited in this Brief to identify the portion of the Transcript referred to, except where the testimony of Special Agent Doyle S. Kennedy is involved, which was transcribed separately, and which is indicated by a capital K, followed by the date and page. The Government hopes in this manner to facilitate the Court's consideration of the Record on Appeal.

I.
JURISDICTIONAL STATEMENT.

This is an appeal from a judgment after conviction following trial by jury under Title 15, Section 714(m). Jurisdiction is conferred by virtue of the provisions of Title 28, Section 1291 and Rules 37 and 39, Federal Rules of Criminal Procedure.

II.
STATEMENT OF THE CASE.

A. Summary of the Government's Case.

In the Indictment the Grand Jury alleged in effect that appellant bought surplus lima beans from the Commodity Credit Corp. (C.C.C.) for export, that he did not export them, but that instead he sold them domestically contrary to his contract to export, and that appellant falsely stated to a Government agent that he had exported all of the surplus limas.

To prove these allegations the Government offered circumstantial evidence as follows:

(a) That appellant presented as proof of export, 11 Mexican "Landing Receipts" which were false and fictitious documents;

(b) That the files of Shipper Export Declarations (S.E.D.), required to be filed with U. S. Customs for subject exports, were checked by American custom officials and no corresponding documents to the 11 Mexican "Landing Receipts" could be located;

(c) That appellant sent to Mexico a truck load and caused the driver to present to American Customs officials at San Ysidro, California, a Shippers Export Decla-

ration representing that the load contained 350 cwt. of limas, but Government inspection of that load revealed only 20 cwt. of limas so placed as to hide the rest of the load, the balance being other produce. This raised an inference that any or all of the S.E.D.'s supplied by appellant as proofs of export might contain similar fraudulent and false claims as to the actual produce exported;

(d) That up to October 6, 1954, appellant sold 13,656 cwt. of lima beans in the United States domestic market, out of a total supply of 23,164 cwt. giving rise to an inference that all of the 15,417 cwt, of surplus limas purchased from the C.C.C. could not have been exported;

(e) That false invoices were included by appellant in the corporation's records during an examination thereof by Special Agent Doyle S. Kennedy of the Department of Agriculture, which invoices purported to show that domestic lima transactions were transactions in some other commodity, *e.g.,* black-eyed peas, etc., for the purpose of concealing the fact that the surplus limas had been sold domestically.

B. Facts.

Appellant Victor L. De Casaus was the General Manager of Casaus Inc. [K 4/17/56, p. 26], a family corporation [5/1/56, p. 118], which also operated under fictitious firm names as Casaus Bros. and the New Mexico Bean Co. [4/17/56, pp. 511, 543-545] and had formerly been a partnership [4/17/56, p. 541]. He admitted that he was the one responsible for dealings with the Government [K 4/17/56, p. 26]. In such capacity he purchased quantities of lima beans from the Commodity Credit Corporation [5/1/56, pp. 101, 104-

106, 110-111], under an agreement that they would not be sold on the domestic market, but would be exported, and Casaus would furnish the C.C.C. satisfactory proof of exports [Exs. 1, 4]. The purchase price was low, but the contract provided that in the event the beans were not exported, the purchaser would pay the domestic price instead of the reduced price. Contrary to said agreement appellant sold the lima beans on the domestic market [5/1/56, pp. 119-120, 124, 126], at a price slightly below then current market prices. [4/13/56, pp. 333-334]. Appellant then furnished the C.C.C. with false proofs of exports [Exs. 40, 41] in order to avoid paying the Government the higher price for domestic sale of limas required by the contract. [Exs. 1, 4].

Information had come to the Department of Agriculture that export lima beans were reaching the domestic market [K 4/19/56, p. 93]. The Department assigned Special Agent Doyle S. Kennedy, Compliance and Investigation Branch, Commodity Stabilization Service, to investigate the source of these beans [K 4/11/56, p. 4; K 4/17/56, p. 22]. His investigation led him to appellant [K 4/17/56, p. 23; K 4/20/56, pp. 25-27]. The Casaus investigation had two phases. The first phase began in early May 1954 [K 4/17/56, p. 23], and concluded July 20, 1954 [K 4/18/56, pp. 53-54]. The second phase began on November 1, 1954 [K 4/18/56, p. 94] and concluded December 13, 1954 [K 4/19/56, p. 75].

During the first phase appellant presented to the Department of Agriculture certain documents, which he claimed were proofs of export in that he alleged them to be Mexican "Landing Receipts" showing import into Mexico of lima beans from the United States [Ex. 39; quoted [K 4/18/56, pp. 88-93; Ex. 41]. In fact, 11 of

these were false documents [Exs. 40, 41] according to the testimony of Jimeniz, a customs official of the Republic of Mexico who was sent by his Government to be a witness [4/11/56, pp. 147, 155, 158, 161-167]. Also Johnny Harmison, a truck driver and employee of appellant testified he took a truck load of merchandise to the Mexican border from Los Angeles on July 17, 1954 [4/13/56, pp. 407-417; Ex. 112]. The documents he presented to U. S. Customs represented that he had 350 cwt. of lima beans aboard [4/17/56, p. 472; Ex. 112]. Although the practice of customs was to accept the declaration of shippers regarding the contents of load, because of the investigation of Casaus then being conducted this particular load was checked. The van-type truck had 20 cwt. of limas visible at the rear, but inspection showed other products, not limas, constituted the balance of the load [4/17/56, pp. 471-472].

Most of the alleged export shipments which were covered by false "Landing Receipts" [Exs. 40, 41] were purportedly made to a firm in Mexico, Almacenes Distributores Mercantiles Las Casas. Appellant's own letter showed that his brother Alfonso was then an official of the Mexican corporation [4/18/56, pp. 89-93; Ex. 39]. This same brother had participated in an attempt to prevent the Government from obtaining necessary Casaus Inc. records for the trial [4/11/56, pp. 114-124, 136-141; 4/12/56, pp. 223-233]. The Government witnesses Simmons and Fawver testified to their search of American customs records in an attempt to find American export documents corresponding to the Mexican "Landing Receipts," with negative results [4/13/56, pp. 362, 365, 379, 381].

In the second phase of the investigation Kennedy found that the false invoices had been inserted in the appellant's records, the purport of which was that products other than lima beans were sold to various domestic merchants when in fact the limas were sold [4/18/56, pp. 109, 115-128; 4/19/56, pp. 8-9]. The Government produced the domestic purchasers of the lima beans as witnesses. (See testimony of Cleo H. Barth, Marcus Rosenberg, Rosario Provenzano, Benjamin Francis Harris, Mary Hardage Oxford.) The figures showed Casaus Inc. had an inventory on February 28, 1954 of 7,004 cwt. [Ex. 115A], and purchases from other than Government sources of 337 cwt. [Exs. 8, 9] during the period March 1, 1954 to October 6, 1954. Purchases from the Government during this same period amounted to 15,417 cwt. [Ex. 124]. Domestic sales during this time were 13,656 cwt. [Exs. 10-23, 46-50]. Simple mathematics indicates that this left only 9,102 cwt. available for export, *if in fact appellant did export any limas,* against a required export of 15,417 cwt., a shortage of 6,315 cwt.

On November 1, 1954, when Kennedy resumed his contact with appellant in connection with the investigation, the two gentlemen had a conversation. Kennedy related it in part as follows [K 4/18/56, p. 102]:

> "With respect to his lima bean purchases from the C.C.C., he (Appellant) stated that he had received *all lima beans under all of the transactions* from the C.C.C. and *that he had exported them all* and he drew up a work sheet showing the purchases from C.C.C. which he stated was complete." [Ex. 124; emphasis supplied.]

Kennedy related further [4/18/56, p. 104]:

"A. Mr. Casaus said that all of these beans had been exported at this time.

Q. Indicating? A. 15,417 bags is the total, and a fraction.

Q. Continue then with your conversation on November 1, 1954."

Prior to trial, appellant made a Motion for a Bill of Particulars [Clk. Tr. p. 32]. The Court, after hearing the Motion on January 16, 1956, ordered the Government to make available to appellant for inspection certain described documents upon which it intended to rely. Notice of the entry of this Order was given to appellant [Clk. Tr. p. 47]. Prior to trial the required documents were photostated and given appellant pursuant to arrangements between counsel. No further request was made regarding the Bill of Particulars although the denial, after requiring the Government to permit inspection, was without prejudice [Clk. Tr. p. 47].

A demand was made by appellant during trial to inspect the voluminous customs records [4/17/56, p. 464]. This followed testimony on April 13, 1956 by Fawver and Simmons, United States Customs officials, that they had searched the customs records at Calexico and San Ysidro respectively, for Shippers Export Declarations Form No. 7525-V, a required export document, for shipments corresponding to the false Mexican "Landing Receipts" [Exs. 40, 41] and that they did not find any corresponding documents. The agents produced the records, but, pur-

suant to Treasury regulations requiring them to do so, they respectfully declined to permit a general search by appellant based upon the confidential character of the records and the Government's consequent claim of privilege. In this regard, the following portions of the transcript are pertinent [4/18/56, pp. 577-578]:

> "The Court: Anyhow, the Motion for the Production of Documents has been complied with, they are produced, that is they are here; but the Motion for Inspection of all these documents as heretofore made between certain dates, as I recall it was about the first of March and the end of November. . . .
>
> "Mr. Dunn: That is right.
>
> "The Court: (resuming discussion) . . . is denied. If however, you desire inspection of specified documents or any documents in those records which relate to the Casaus Bros., Casaus, Inc., New Mexico Bean Co., Almacenes, or whoever your purchaser might be in Mexico, that you claim, or whoever your broker might be on the dates mentioned, I will order them to produce those particular documents for your inspection."

[4/18/56, p. 622]:

> "The Court: Now coming to your further motion to produce as to the other two Counts, I do not think you are entitled to any sweeping discovery. I do think that you are entitled to have an inspection of any Forms 7525-V which show an exportation by Casaus, or Casaus Bros., or the New Mexico Bean Co. on or about the date shown on the attachments to Exhibits 39, 42 and 43, and from the specific consignor and to specific consignees named therein and not otherwise.

"Now I can formalize that as to Exhibits 41 and 43 but I have not done it as to Exhibit 42. I do not know that you want these that are involved now in 42 and 43, Mr. Lavine, because the Government says they are not challenging the correctness of those.

"Mr. Lavine: No I don't."

[4/18/56, p. 626]:

"The Court: Well, in any event, the Motion is denied. It is too broad and all inclusive."

The Shippers Export Declarations 7525-V were documents filed by or on behalf of appellant's company, but appellant refused to specify the documents which he claimed he had filed and upon which he intended to rely. Without such specification, the Court denied appellant's Motion for inspection as indicated above because the demand was too broad. The Court indicated a properly specific Motion would be granted, as is indicated in the foregoing quotations, but one was not made.

The question of taking certain depositions in Mexico was raised by Motion of appellant during the trial [4/14/56, pp. 436, 455, 457]. The Government objected that no proper notice of such Motion was given and that appellant was not surprised because he had had notice of the Government's claims with respect to the evidence sought since July 20, 1954. The Court sustained these objections [4/14/56, pp. 445-447, 452, 457.]

Appellant offered certain documents, Exhibits EB and FB during trial, purporting to be copies of Shippers Export Declarations [5/3/56, p. 42]. The Government

objected to the offer based on a lack of foundation in that these documents were not shown to have any connection with Casaus Inc. nor any of the other companies of appellant, nor with appellant nor with *lima bean* transactions. The objection was sustained [5/3/56, p. 42]. The witness testified only that they were documents which he found in the files of the Mexican corporation [5/3/56, pp. 40-41]. He was not the accountant for the corporation [5/3/56, p. 55].

While the jury was deliberating they requested the exhibits in the case [5/14/56, pp. 774-775]. By mistake the bailiff took appellant's J, K, and L, which had not been admitted into evidence, to the jury room [5/14/56, p. 775]. These were Casaus Inc. invoices of food products from which pertinent invoices had been removed and introduced into evidence. Appellant had offered J, K and L in evidence and the Government objected to them as being irrelevant and immaterial since not shown to be connected with the bean transactions. The objection was sustained [K 4/23/56, pp. 6-7; 4/25/56, p. 65]. When appellant learned after trial of the delivery of said exhibits to the jury, he included such delivery as one of the grounds in his Motion for New Trial [5/14/56, p, 784]. The Court denied the Motion in this regard on the ground that the error, if any, was harmless [6/11/56, p. 788].

III.
ARGUMENT.

A. Ample Evidence Supported the Jury's Verdict.

A reading of the entire record clearly indicates that appellant was engaged in a *blatant fraud* on the agricultural price support program of the United States, which program was being carried out through the agency of the Commodity Credit Corporation (C.C.C.). He purchased lima beans at a price far below the market from the C.C.C. promising to export. He agreed with the C.C.C. that in the event he did not export the limas he would pay to C.C.C. the going domestic price. He did not export, but sold the beans domestically. To avoid the contractual obligations he presented forged and false documents to the C.C.C., and the government investigator,, and thereafter tried to mislead the investigator by putting false invoices in his files. The latter were used in an attempt to cover up the domestic sale of the limas. He attempted to obtain false proofs of export by sending trucks to Mexico with S.E.D.'s declaring that the loads were lima beans, when in fact other commodities comprised the load (the Harmison load).

Appellant's real complaint seems to be that he claims that the Government is required to prove that he used the exact words set forth in the Indictment. It is interesting to note that no quotation marks are used in Count IV of the Indictment, of which appellant stands convicted, and thus it does not purport to be an exact statement by defendant.

Kennedy, the investigator, testified that he began the second phase of his investigation on November 1, 1954. He asked appellant in a conversation that day "whether

or not he had received delivery of all of the beans contracted for, and he stated he had" [K 4/19/56, p. 61]. Deliveries of these beans concluded as of October 6, 1954 [Ex. 124] according to a work sheet prepared by appellant [K 4/19/56, p. 61]. This showed appellant had contracted for 15,539 cwt. of C.C.C. limas and had received 15,417.21 cwt. net weight.

With this information before Kennedy and appellant, Kennedy stated the following conversation took place [K 4/18/56, p. 102]:

> "With respect to his (appellant's) lima bean purchases from the C.C.C., he stated that he had received all lima beans under all of the transactions from the C.C.C. and that *he had exported them all,* and he drew up a work sheet showing the purchases from C.C.C. which he stated was complete." (Emphasis supplied.)

[K 4/18/56, p. 104]:

> "Q. But with respect to any conversation you had at that time, did you have further discussion with Casaus? A. Mr. Casaus said that all of these beans had been exported at this time.
>
> "Q. Indicating? A. 15,417 bags is the total, and a fraction.
>
> "Q. Continue then with your conversation on November 1, 1954."

The foregoing, taken in context, is certainly equivalent to the allegation of Count IV of the Indictment, that as of October 6, 1954, Casaus Inc. had exported to the Republic of Mexico, 15,424 cwt. of lima beans which Casaus purchased from the C.C.C.

The Grand Jury had merely extracted the specifics from the evidence which appellant and Kennedy had before

them at the November 1, 1954 conversation, so that appellant would be advised of the matter with which he was being charged in the Indictment. Appellant made the same contentions at the trial, that he had exported all the C.C.C. limas to Mexico [4/30/56, p. 40]. The Trial Jury did not believe him, they did believe he had made the statement to Kennedy contained in Count IV of the Indictment.

It is not incumbent upon the prosecution to prove a false statement in the *exact* language of the indictment.

> *Stevens v. United States* (6 Cir. 1953), 206 F. 2d 64, 66-67.

> "Nor was it necessary for the Government to prove that the alleged discrepancy between the cost data statement and the books of the School was in the exact amount as charged by the indictment. The cost data statement was a false statement if it differed materially from the amount shown by the books, even though the difference was not the exact difference charged, and such a showing did not violate the general rule that allegations and proof must correspond in order not to constitute a variance. The rule is based upon the obvious requirements:
>
> (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and
>
> (2) that he may be protected against another prosecution for the same offense.
>
> *Berger v. United States,* 295 U. S. 78, 82, 55 S. Ct. 629, 79 L. Ed. 1314." (Citing other cases.)

B. Appellant Made the False Statement for the Purpose of Influencing the Action of the C.C.C.

Appellant alleges on page 9 of his Opening Brief (under Point II) that the lima beans had been fully paid for. This ignores facts which were before the jury [Exs. 1, 4]. The purchases were made subject to an obligation to pay the differential between the special "export" price and the market price [Exs. 1, 4]. Since the jury had to find a substantial quantity of the beans were not exported in order to find appellant guilty, it follows that those not exported were not fully paid for. There was no evidence that Casaus paid such difference.

It is also arguable that appellant's actions did tend to obtain money, property or something of value for himself, given his position as General Manager of the Corporation. He was the "boss" according to Harmison, a company employee [4/13/56, p. 411].

However, it is not necessary for the prosecution to rely on the foregoing alone, because the statute has another alternative provision:

> "Whoever makes *any statement* knowing it to be false, . . . *for the purpose of influencing in any way the action of the Corporation,* or for the purpose of obtaining for himself or another, money, property or anything of value, . . ." (Emphasis supplied.)
>
> Title 15, Sec. 714m(a), U. S. Code.

There cannot be room for doubt that the false statement, and all the attendant fraudulent conduct of appellant, was designed to influence the action of the C.C.C., to wit: to refrain from collection of the additional money to which the C.C.C. became entitled by virtue of the domestic sale of the lima beans.

Count IV of the Indictment alleges the two portions of the statutory language in the conjunctive. The statute is in the disjunctive. This is recognized as proper pleading.

> "As a general rule, where a statute specifies several means or ways in which an offense may be committed in the alternative, it is bad pleading to allege such means or ways in the alternative; the proper way is to connect the various allegations in the accusing pleading with conjunctive term 'and' and not with the word 'or.' 42 C. J. S., Indictments and Informations, §101, quoted in *Price v. United States* (5 Cir.) 150 F. 2d 283, cert. den., 326 U. S. 789, 66 S. Ct. 473, 90 L. Ed. 479."
>
> *Heflin v. United States,* 223 F. 2d 371, 373 (5 Cir., 1955).

The Government is only required to prove one or the other purpose.

> "When several acts specified in the statute are committed by the same person, they may be coupled in one count as together constituting one offense although a disjunctive word is used in the statute, and proof of any one of the acts joined in the conjunctive is sufficient to support a verdict of guilty. So where as here, the indictment charged that the defendant did lawfully remove, deposit, and conceal, it was enough to prove any one."
>
> *Crain v. United States,* 162 U. S. 625, 634-636, 16 S. Ct. 952, 40 L. Ed. 1097;
>
> *Heflin v. United States,* 223 F. 2d 371, 373-374 (5 Cir., 1955);
>
> *Shepard v. United States,* 236 Fed. 73, 81-82 (9 Cir., 1916).

C. A Substantially Lesser Quantity of Limas Was Exported.

Also in Point II of the Argument in the Appellant's Opening Brief (p. 9), he asserts there is no proof of "the lesser quantity claimed by the Government." This ludicrous contention deserves little attention. Here is a person who fraudulently conceals his failure to export. He now says in effect, "you have to specifically tell me exactly how much I cheated you, or my conviction should not stand."

As far as the Government is concerned we proved that 20 cwt. of limas went over the border (on the "Harmison load" which was fraudulently claimed to contain 350 cwt. of limas). Although for purposes of trial, while we had to accept proofs of export which were on file which we could not prove to be false, we did establish that 6,315 cwt. (631,500 lbs.) of limas, could not have been exported. Considering the implications naturally arising from the "Harmison load" it is very likely that large additional quantities were not exported, but that a proof of export was obtained. Suffice to say a substantial quantity was not exported, enough to make it a matter of which the criminal courts should take cognizance. This is all that the law requires.

D. The Perjury "Two-Witness" Rule Does Not Apply. The "Gold" Case Cited by Appellant Does Not Hold Differently, Merely Contains the Suggestion of a Single Justice of the United States Supreme Court That the Question Should Be Considered.

The next point of Appellant's Brief would urge this Court to apply the perjury "two witness" rule to a case based upon a specific false statement statute (714m(a), Title 15, U. S. Code). His candor that such is not the law in this Circuit is admirable. But any close reading of the United States Supreme Court perjury cases clearly indicates that the two witness rule is not a hard and fast one. The testimony of a single witness is sufficient when his testimony is corroborated by relevant circumstances.

Weiler v. United States, 323 U. S. 606, 610-611;

Hammer v. United States, 271 U. S. 620;

Vetterli v. United States, 198 F. 2d 291 (9 Cir., 1952), cert. granted on other grounds, 344 U. S. 872.

"This court refused to apply the perjury corroboration rule to a prosecution under Section 1001 in *Todorow v. United States* (9 Cir.), 173 F. 2d 439; cert. den. 1949, 337 U. S. 925, 69 S. Ct. 1169, 93 L. Ed. 1733."

* * * * * * * *

"The question is a close one, but the reasons behind the perjury rule do not seem applicable."

Fisher v. United States, 231 F. 2d 99, 105, 106 (9 Cir., 1956).

Here, first of all, we do not have a perjury case. Assuming, *arguendo,* that perjury rules should be applied, there is ample corroborating evidence in this case.

(a) Appellant himself testified [4/30/56, p. 40], on direct examination by his counsel as follows:

> "Q. (By Mr. Lavine): After processing those beans did you thereafter export all of those beans that were secured from the Commodity Credit Corp. to Mexico? A. Yes sir."

This is the same contention, Kennedy stated in his testimony, that appellant made to him on November 1, 1954. Also, Government Exhibit 39 [quoted in K 4/18/56, pp. 88-93], a letter signed by appellant, makes the same representation as of an earlier date. Of particular interest is the following portion of that Exhibit [K 4/18/56, pp. 88-89]:

"These Landing Receipts are all for the beans in question which were exported to Mexico through Mexicali. . . ."

And later [K 4/18/56, pp. 89-90] "If the Department is interested, Alfonso G. DeCasaus, and the corporation of which he is an officer, will submit sworn statements as to the disposition of all of the beans imported into Mexico by said company after their arrival in Mexico, so that there can be no doubt that the same were received. This accounting might be of some assistance, but the time which the undersigned had to spend in Mexico was too limited to permit obtaining the same in view of the urgency of getting this information to you, before your report was forwarded to the Commodity Credit Corporation."

There being ample corroborating evidence, two witnesses to the statements should not be required even if the Court were inclined to apply perjury standards to this prosecution under the C.C.C. Act.

E. The Statute Involved Applies to Statements Made to Department of Agriculture Investigators.

Appellant's Point IV is his conclusion that the statute here involved was not meant to apply to an investigator. As authority he cites a decision of the United States District Court for Colorado. It is not persuasive. No other authority is given.

The Statute says "Whoever" which seems clear and sufficiently understandable. In this case the evidence shows that Casaus Inc., for whom appellant worked, was required by its contract to make records regarding its transactions with C.C.C. available to representatives of the C.C.C. Kennedy, to whom the false statement was made, was designated to inspect those records and make an investigation. [K 4/11/56, p. 4; K 4/17/56, pp. 22-23.]

Certainly if the Government is going to be able to protect itself from avaricious businessmen, in its legally authorized business affairs, it should have the power to make it a crime to make false statements in such transactions to representatives of the Government. Even in such a narrow construction of the statute, this case would qualify. To whom would the "Whoever" of the statute apply if not to the duly authorized and appointed investigator of the Government? Neither reason nor logic gives support to this contention of the appellant. Rather it supports the view that, if "Whoever" is to be restricted in any regard, it should at all events apply

to the duly authorized representative of the Department having the dealings which are the subject of the false statement.

F. Count IV of Indictment States an Offense Against the Laws of the United States.

Appellant's Point V alleges that Count IV of the Indictment fails to state an offense against the laws of the United States. It is elementary that since the advent of the Federal Rules of Criminal Procedure it is generally sufficient to plead an offense in general terms in the language of the statute supplying in each count the specific information applicable to the particular transaction described therein.

Cohen v. United States (6 Cir. 1949), 178 F. 2d 588, 591, cert. den. 359 U. S. 920;

Sutton v. United States (5 Cir. 1946), 157 F. 2d 661;

Mellor v. United States (8 Cir. 1946), 160 F. 2d 757, cert. den. 331 U. S. 858;

Rule 7c, Federal Rules of Criminal Procedure.

> "The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."
>
> *United States v. Debrow,* 346 U. S. 374, 376.

This has been done in Count IV. There was added the language to which appellant objects to the effect that the

statement was false, as appellant well knew, in that a "much lesser quantity" (than that purchased) was in fact exported to Mexico. This language appellant tags as a "sheer conclusion of the pleader". It is, in essence, a statement of ultimate fact. It meets the test of advising the defendant sufficiently of the nature of the offense so that he can prepare his defense and avoid surprise. He knew that the Government was going to contend that a substantial number of his claimed export shipments were not actually made. His defensive problem was then crystallized into supporting his contention that they were exported.

On the other side of the picture, the Grand Jury was faced with evidence that put in doubt whether any lima beans were exported. All they knew was that the large quantity of claimed exports had not been made. Unless a substantial quantity of beans had not been exported, there would be no indication that a crime had been committed. Thus, they had to find the failure to export a substantial quantity in order to return the Indictment. That was the ultimate fact, or a conclusion of fact, but not a conclusion of law by any stretch of the imagination.

In his Point V, appellant also contends "at the time of the Indictment such facts were not presented to the Grand Jury . . ." No Grand Jury transcript has been filed with the Clerk, nor is one a part of this record. The proceedings of the Grand Jury were secret. Appellant does not tell us how he came by such information, if it is the fact, nor does he show us where the record supports his said contention. Appellee asserts that it has no basis in fact and that no transcript of such proceedings has ever been made.

G. There Was Not a Final Denial of Appellant's Request for a Bill of Particulars.

So that appellant will not have further doubt: *The Government does not now, nor has it on any occasion pertinent to this proceeding, claimed that appellant or his corporation exported any lima beans whatsoever."* On the contrary, the contention is that any export of limas was negligible. Because of appellant's fraudulent activities, however, the Government only succeeded in proving definitely that 631,500 lbs. were not exported. By inference from the evidence presented the trier of fact could have found the Government's contention was entirely true and that none were exported.

With regard to appellant's argument in his Point VI, that his request for a Bill of Particulars was denied, the Court is respectfully directed to the following facts:

On January 17, 1956, the United States Attorney caused to be served by mail on appellant's counsel of record a Notice of Entry of Order on Bill of Particulars [Clk. Tr. p. 47], containing a copy of the Order on the Bill of Particulars entered by the District Court for the Southern District of California, Central Division on January 16, 1956 [Clk. Tr. p. 48]. In essence, the appellant's demand for a Bill of Particulars was responded to by the Court's granting an order to inspect and copy documents, and in all other respects the Motion was denied *without prejudice* [Clk. Tr. pp. 48-49]. The record is devoid of any further pre-trial renewal of the Motion on appellant's part, although the Court's Order left such a course open in the event the granted inspection of the documents did not satisfy him.

In any event, the granting or denial of a Bill of Particulars is a matter entirely within the discretion of the

Trial Court, and is only ground for reversal when an abuse of discretion is shown.

Himmelfarb v. United States (9th Cir., 1949), 175 F. 2d 924, cert. den. 338 U. S. 860;

Wong Tai v. United States, 273 U. S. 77;

Kobey v. United States, 208 F. 2d 583 (9 Cir., 1953).

No evidence or showing of such abuse is made other than the bare allegation in appellant's Brief that his request was "essential".

H. Denial of Appellant's Request to Fish Through Voluminous Government Customs Records Was Not Error.

The rule is well established that a certified and properly authenticated document from the files of the U. S. Government is sufficient evidence, without the necessity of appearance of any witness, of an official record, or *the absence thereof.*

Rule 27 of the Federal Rules of Criminal Procedure provides:

> "An official record or an entry therein *or the lack of such a record or entry* may be proved in the same manner as in civil actions." (Emphasis added.)

Rule 44 of the Federal Rules of Civil Procedure provides in part as follows:

> "(b) A written statement signed by an officer having the custody of an official record, or by his deputy, that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contained no such record or entry."

The prosecution, rather than following that procedure, elected to bring in Customs officials [Witnesses Fawver, Simmons, 4/13/56] to testify to their search of customs records. This was corroborating evidence to the testimony of customs official of Mexico regarding the falsity of the 11 Mexican "Landing Receipts" [Witness Jiminez 4/11/56, 4/12/56; Ex. 40]. The intention of the Government was to show (1) that the Mexican documents were false, (2) that there was no corresponding document on the American side, and (3) that this was part of a pattern of deception worked upon the C.C.C. by appellant. These contentions were inferentially adopted by the jury in its finding of guilty.

The action of the Government in bringing in the witnesses gave the defense an opportunity to cross-examine as to their search, so that the appellant could be satisfied it was a fair search. Nevertheless, the defense made a demand that it be permitted to fish through the voluminous files of Shippers Export Declarations Form 7525-V [4/20/56, p. 567], to see if they couldn't find something they could claim as a Casaus export of limas. These are documents required to be filed by the shipper, and made up by him or his agents in the regular course of business. Thus appellant, or Casaus Inc., would normally have a copy of such document in his own files. It would have been a very simple matter for appellant to search his files, get the date and the number of the documents he wished to request, and point them out to the Customs officials or demand the specific documents, if *any such documents in fact existed.* The Court invited appellant to specify and indicated it would grant the Motion to Inspect to that extent. Appellant says he gave certain dates and months, but he was requesting a general search of the records for those times as the record indicates. [4/20/56, pp.

566-567.] Appellant never did respond to the Court's invitation to specify the documents which he had in mind. [4/18/56, pp. 577-578]:

"The Court: Anyhow, the Motion for the production of documents has been complied with, they are produced, that is, they are here; but the Motion for Inspection of all these documents as heretofore made between certain dates, as I recall it was about the first of March and the end of November . . .

"Mr. Dunn: That is right.

"The Court: (resuming discussion) It is denied. If however you desire inspection of specified documents, or any documents in those records which relate to the Casaus Bros., Casaus Inc., New Mexico Bean Company, Almacenes, or whoever your purchaser might be in Mexico, that you claim, or whoever your broker might be on the dates mentioned, I will order them to produce those *particular documents* for your inspection." (Emphasis supplied.)

[4/18/56, p. 622]:

"The Court: Now coming to your further Motion to Produce as to the other two Counts, I do not think you are entitled to any sweeping discovery. I do think that you are entitled to have an inspection of any forms 7525-V which show an exportation by Casaus or Casaus Bros., or the New Mexico Bean Co., on or about the date shown on the attachments to Exhibits 39, 42 and 43, and from the specific consignor and to specific consignees named therein and not otherwise.

"Now I can formalize that as to Exhibits 41 and 43, but I have not done it as to Exhibit 42. I do not know that you want these that are involved now in 42 and 43 Mr. Lavine, because the Government says they are not challenging the correctness of those.

"Mr. Lavine: No I don't."

[4/18/56, p. 626]

"The Court: Well, in any event, the Motion is denied. It is too broad and all inclusive."

There is an obvious advantage to an exporter to go through Customs records and see what his competition is shipping and to whom. That is one of the reasons the documents are classified and not made available generally. Based on the recent *Jencks* decision, United States Supreme Court, June 3, 1957, ... U. S. ....., appellant contends he is entitled to a dismissal because the Government claimed its privilege. In *Jencks,* the defense showed there were reports made which related to matters touched upon by the witnesses' testimony. The defendant was held to be entitled to examine these reports to assist in his cross-examination of the witnesses. The facts to which the witnesses testified in *Jencks* had occurred several years before. In the instant case, there were no such reports, merely the absence of a business-type record in the Government files that appellant or his corporation would have made up, if *such a record had ever existed.* Here, the privilege is asserted not on behalf of the Government itself, but for the benefit of appellant's competitors in safeguarding the privacy of their business records and information. [Code of Fed. Reg., Title 19, Ch. 1, Sec. 26.4 (Revised, 1953).] It is akin to the secrecy attached to the income tax returns filed by individuals with the Federal Government. Surely it cannot be contended that *Jencks* will open the income tax returns to every marauding defendant who asserts information therein contained might be helpful to him. Neither should appellant be entitled to make a general inspection of these customs records, thereby obtaining information about the operations of his competition.

The ruling of the Court called for an exercise of discretion. The Court said it would allow inspection of specific documents. This was not unreasonable under the circumstances. Appellant did not elect to follow the course indicated, and should not now be allowed to complain.

Appellant claims the Government had the choice of dismissal or disclosure. We cannot move the clock backwards and no such alternative was presented at the trial. If the Government's position as herein expressed is not accepted, then the most to which appellant should be entitled is a new trial, in which the alternative could be presented and dealt with. It should not be the basis for the dismissal of a defendant who has been found guilty by jury trial.

I. Denial to Take Depositions Was Not Error.

Appellant moved during trial to take depositions of certain witnesses in the Republic of Mexico, J.J. Arriaga, Gabino Mancilla Veliz, and Luis Orozco. The latter eventually appeared and testified on behalf of appellant at the trial. Appellant urges error in refusing the request.

Appellant did not see fit to have his proposed interrogatories made a part of the record on appeal. Notice of the Motion was not given as provided by law.

Rule 15, Federal Rules of Criminal Procedure.

Title 18, Section 3492, United States Code:

> ". . . but under Rule 15, the criterion by which the trial court orders the taking of a deposition is whether it is necessary in order to prevent a failure of justice. This discretion vested in the trial court is broad, and Rule 15 contemplates the taking of

depositions in criminal cases only in exceptional instances. . . ."

Heflin v. United States (5 Cir., 1955), 223 F. 2d 371, 375.

The Court determined that appellant made no showing of surprise or other reason for taking the deposition without proper notice. This he would be required to do in order to have the time requirement waived or time shortened.

Rule 15(b), Fed. Rules of Criminal Procedure provides:

"The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time."

Title 18, U. S. C., Sec. 3492 (5 days' notice required).

In any event there is nothing before this Honorable Court on appeal which would indicate that the trial court's denial of the Motion to take depositions resulted in any prejudice to appellant. In order to predicate error on such denial, prejudice must be shown.

Federal Rules of Criminal Procedure, Rule 52(a), (b);

Lutwak v. United States, 344 U. S. 604, 619-620, 73 S. Ct. 481, 97 L. Ed. 593, reh. den. 345 U. S. 919, 73 S. Ct. 726, 97 L. Ed. 1352;

Allred v. United States (9 Cir., 1944), 146 F. 2d 193;

Shelton v. United States (5 Cir., 1953), 205 F. 2d 806, 810, cert. den. 346 U. S. 892, 74 S. Ct. 230, 98 L. Ed. 395.

J. No Error in Instruction Re Lack of Extradition Treaty With Mexico for Perjury.

In his Point VIII (App. Br. p. 15), appellant gives passing reference to the Court's instruction regarding lack of a treaty between the United States and Mexico permitting extradition from Mexico for a person charged with perjury in the United States [Clk. Tr. p. 77-A 19]. Appellant seems to complain that the jury could infer that the testimony of their Mexican witness was untrue from this instruction. In the first place, the Government relied heavily on the testimony of the Mexican official, Jiminez; the defense had Orozco, an employee of the Mexican corporation with which appellant's brother had been employed as an official. Certainly no prejudice is shown by such an instruction, it not being directed in favor of or against either party.

Berger v. United States, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314;

United States v. Spadafora (7 Cir., 1950), 181 F. 2d 957, 959.

It operated equally as to both litigants.

K. This Court Should Not Acquit.

Apparently as a makeweight appellant cites the *Yates* case, United States Supreme Court, June 17, 1957, ... U. S. ....., for the proposition that this Honorable Court should direct the District Court to grant a Judgment of Acquittal. In that case the United States Supreme Court found the evidence against certain defendants to be palpably insufficient upon which to base a conviction, and took the extraordinary course of ordering acquittal as to such defendants. However such action may be regarded, there is no such situation presented in the in-

stant case. The evidence before the Court has heretofore been set out, is overwhelming, and need not be repeated at this point. No specification as to the deficiency of evidence is pointed out by appellant.

L. Refusal of Documents Where No Foundation Laid Not Error.

Appellant's Point IX complains that certain documents, which he fails to identify, should have been admitted into evidence. While it would not seem to be the duty of the Government to search the records, and certainly not the Court's duty, to see what documents are referred to, we have nevertheless done so. The Government will not be in a position to reply in writing to the appellant's closing brief, and he may identify such documents therein. It would appear from our examination that appellant refers to Exhibits EB and FB.

The bald assertion is made by appellant that they are documents "authenticated" in Mexico and "certified" by the American Consul. No such evidence was offered to the Trial Court. The attempt to introduce EB and FB was made while the witness Orozco was on the stand [5/3/56, p. 40]. The gist of his testimony was that these purported to be copies of documents dated respectively April 6, 1954 and July 23, 1954. Orozco said he had found them in the files of Almacenes Distribuidores, a Mexican Corporation, during the preceding week. No foundation as to their authenticity or their connection with the appellant or his corporation, or that they concerned lima bean transactions, was shown. The Government objected to the offer on the grounds that there was "no proper foundation" [5/3/56, p. 42], and the objection was sustained. The foundation was never offered.

Manifestly there was no basis for the introduction of such documents and the ruling of the Trial Court was correct. (*Hass v. United States* (8 Cir. 1937), 93 F. 2d 427, 436.) Appellant does not give any reason why this denial by the Court was error. He merely asserts that it was.

M. Denial of Motions for Acquittal Was Not Error.

Appellant assigns the denial of Motions for Judgment of Acquittal as the basis for error. Therein he asserts the "total lack of evidence". This cannot be considered a serious contention, being contained in three sentences without any showing of deficiency in the evidence. There is no attempt in appellant's Brief to state what evidence was before the Trial Court. Ignoring the evidence does not do away with it. The appellee respectfully refers the Court to the Statement of Facts in this Brief as the basis for the Trial Court's proper denial of the said Motions. Nothing would be served by repeating the facts at this point.

N. The Inadvertent Delivery of Defense Offered Exhibits, Not Admitted, to the Jury Room Was Harmless Error.

In Points IX and XI of appellant's Brief, (pp. 16-17), the question is raised that Exhibits J, K, and L for identification were taken to the Jury Room during the Jury's deliberation. (Appellant does not identify the Exhibits, but a study of the record indicates that the foregoing were the ones referred to.) These were not admitted into evidence. They were offered in evidence by the appellant, however [K 4/23/56, pp. 6-7; 4/25/56, p. 65]. The Government objected thereto on the ground that they were not relevant or material and the objection was sustained.

An examination of the Exhibits will show that they consist of a series of invoices of Casaus Inc. bound together by months. They do not pertain to lima beans, hence, were not relevant. The lima bean invoices were separated from these and other such exhibits and introduced individually. J, K and L are invoices of Casaus Inc. They could in no way prejudice appellant, otherwise he certainly would not have offered them in evidence. The error, if any, was harmless and no showing of prejudice has been made by appellant.

A motion for new trial based on the fact that documents improperly went to the jury room during the course of its deliberation raises a question within the sound discretion of the trial court. If the court determines that the matter was not prejudicial and therefore denies the motion, it should only be reversed on appeal if the court can be shown to have abused its discretion.

United States v. Strassman (2 Cir. 1957), 241 F. 2d 784;

Finnegan v. United States (8 Cir. 1953), 204 F. 2d 105, cert. den. 346 U. S. 821, reh. den. 346 U. S. 880;

Leland v. United States (4 Cir. 1946), 155 F. 2d 438;

Quercia v. United States (1 Cir. 1934), 70 F. 2d 997.

The Trial Court therefore properly denied the Motion for a new trial on the ground no prejudice was shown.

IV.
CONCLUSION.

1. There was substantial evidence that appellant perpetrated a wilful and deliberate fraud on the Commodity Credit Corporation.

2. Appellant made the false statement that he had exported all of the C.C.C. lima beans for the purpose of influencing the action of the C.C.C.

3. Appellant exported a substantially lesser quantity of lima beans, to-wit: at least 631,500 pounds less than he was required to export by virtue of his contracts with the C.C.C.

4. The false statement to the designated investigator of the C.C.C. was a crime within the provisions of §714(m), Title 15, United States Code.

5. The indictment sufficiently advised the appellant of the crime with which he was charged to enable him to prepare his defense and avoid surprise.

6. The Trial Court's rulings with respect to appellant's demand for bill of particulars, for inspection of records, and for taking of depositions, were within the sound discretion of that court. No abuse of discretion has been shown. There was no error here.

7. The Trial Court did not err in its instruction as to lack of an extradition treaty with Mexico, nor in denying the offer of documentary exhibits where the necessary foundation was not offered.

8. The Trial Court properly denied the appellant's motions for judgment of acquittal.

9. There was harmless error in delivering appellant's Exhibits J, K and L to the jury room, since these exhibits

were not admitted in evidence. The error was not prejudicial to appellant, who had offered such documents in evidence during the course of trial.

Wherefore, the United States respectfully requests the court to affirm the judgment of conviction.

Respectfully submitted,

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